IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.989 OF 2005
WITH
CIVIL APPLICATION NO.1378 OF 2005

Vasant Govindji Kotak & Ors. ..Appellants.

V/s.

Damayanti Hariram. ..Respondent.

Mr.Niranjan Bhadang i/b Law Charter for appellants.

Mr.Jagdish H. Chandan, Son of respondent.

CORAM: A.M.KHANWILKAR,J

DATE : JUNE 5, 2006.

P.C. :

1. Heard counsel for the appellant. Mr.Jagdish H. Chandan appears as Constituted Attorney of Respondent.

2. Admit.

3. As short question is involved, this appeal is taken up for final disposal forthwith by consent. The Constituted Attorney of Respondent waives service.

4. The short question which is involved in this appeal is whether the Court below was right in

rejecting the prayer for adjournment and extension of time made on behalf of the plaintiffs for producing the evidence on record, instead dismissing the suit by order dated 21st April, 2005. The attempt made by the appellants/plaintiffs to recall that order and for restoration of the suit has been answered against the plaintiffs by the Impugned Judgment and Order dated 6th May, 2005. The trial Court has recorded relevant facts, as can be discerned from the impugned Judgment. The grievance of the appellants however, is that the trial Court has misconstrued the relevant events and finding reached by the trial Court on such erroneous assumption cannot be sustained on facts. From the record it appears that the Court passed order dated 22nd June, 2004 requiring the plaintiffs to pay costs for non-compliance of the court's order. However, thereafter, the matter did not progress. On 4th October, 2004 parties and advocates were absent and suit was kept for dismissal on 12th October, 2004. On 12th October, 2004, however, as a last chance the plaintiffs were given time to file affidavit of evidence and statement of plaintiffs' advocate came to be recorded that the plaintiffs were not inclined to examine any trustee of the trust. That statement is found in Roznama dated 12th October, 2004, which is recorded in the impugned

Judgment and Order. Thereafter, the matter was listed on 13th April, 2005. However, on that date the plaintiffs and their advocate were absent. Accordingly, the trial Judge deferred the matter till 21st April, 2005 to be listed under caption "dismissal". On 21st April, 2005 the plaintiffs moved a formal application for adjournment and extension of time for reasons as recorded on affidavit which is at page 37. One of the reason mentioned is that, the Manager who was expected to give evidence on behalf of the plaintiffs was suffering from Tongue cancer and was not able to attend the court proceedings. However, request for adjournment came to be rejected and the trial Judge proceeded to dismiss the suit. Soon thereafter, the appellants moved an application for recalling the order dated 21st April, 2005, which however, has been dismissed by the trial Judge vide impugned Judgment and Order. The primary reason which has weighed with the trial Court is that the suit is pending since 1985 and the plaintiffs have not taken steps to conclude recording of evidence inspite of sufficient time. Besides, the statement was made on behalf of the plaintiffs on 12th October, 2004 that the plaintiffs did not wish to examine Trustees of the Trust but still request for adjournment was made on

behalf of the plaintiffs to produce evidence. The reason however, as is rightly contended by the counsel for the plaintiffs is overlooked by the trial Judge. The reason stated by the plaintiffs was that the plaintiffs desired to examine the Manager of the Trust and not Trustees of the Trust. In so far as Manager of the Trust is concerned, on affidavit it was stated that he was suffering from Tongue cancer and would require some time to place his evidence on record. The explanation so offered by the plaintiffs which is substantiated by medical evidence cannot be said to be unreasonable, so as to discard the same outright. In other words, the basis on which the trial court has proceeded to reject the request of the plaintiffs for adjournment is incorrect. In so far as reference to paragraph-15 and 16 of the affidavit made by the trial Judge in the impugned order is concerned, it does not reveal that the plaintiffs were not interested in concluding the trial. On the other hand, it appears that for the reasons beyond the control of the Plaintiffs, recording of evidence could not proceed. Mr.Chandan, appearing as Constituted Attorney for the respondent submits that the plaintiffs are not interested in concluding the trial. This grievance can be taken care by putting the plaintiffs to strict condition so

as to ensure that the trial will conclude within reasonable time. By this order, therefore, indulgence is shown to the plaintiffs on condition that they will compensate the defendant by payment of costs for the present proceedings and also ensure that recording of evidence is concluded within reasonable time.

5. Accordingly this appeal succeeds on the following terms.

a) The impugned Judgment and order is set aside. Instead, the Notice of Motion No.1685 of 2005 is made absolute. As a consequence, the order passed on 21st April, 2006 dismissing the suit is recalled and the suit is restored to the file to its original number on condition that the appellants shall pay costs to the respondent quantified at Rs.5,000/- within one week from today. It is further ordered that the plaintiffs shall take necessary steps to produce all the relevant evidence at the earliest and not later than four weeks from today, failing which it will be open to the Trial court to proceed in the matter on the assumption that

the plaintiffs do not wish to adduce any evidence in support of their claim.

b) The trial Judge shall conclude the trial expeditiously, preferrably within six months from the date of receipt of this order.

6. Appeal as well as civil application disposed of on the above terms.